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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-486

FEDERAL POWER COMMISSION, PETITIONER

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

No. 72-488

TEXAS GAS TRANSMISSION CORPORATION, PETITIONER

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 17-39)[1] and its opinion on rehearing (Pet. App. 41-53) are reported at 462 F. 2d 853, 865. The initial opinion (No. 578) of the Federal Power Commission (Pet. App. 57-66) and its opinion on rehearing (No.

[1] "Pet. App." references are to the appendices to the petition in No. 72-486.

578–A; Pet. App. 67–71) are reported at 43 FPC 824 and 44 FPC 140.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1972 (Pet. App. 55–56), and the Commission's petition for rehearing was denied on May 11, 1972 (Pet. App. 41–53). On August 4, 1972, the Chief Justice extended the time for filing petitions for writs of certiorari to September 23, 1972. The petitions were filed on September 22, 1972. On December 6, 1972, the Court granted both petitions and consolidated the cases. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether Section 441(a) of the Tax Reform Act of 1969 was intended to withdraw from the Federal Power Commission and other agencies charged with similar regulatory responsibilities the authority to permit a utility, in calculating its federal income tax allowance for ratemaking purposes, to conform its method of computing depreciation on its other property to the method it had elected under the Act to be applicable to its expansion property acquired after 1969.

2. Whether, assuming Section 441(a) did not affect the Federal Power Commission's authority to permit a utility to conform its depreciation methods, the Commission's action in this case was proper.

STATUTE INVOLVED

Section 441 of the Tax Reform Act of 1969, 83 Stat. 626, 26 U.S.C. 167(*l*), is set forth in an appendix to this brief, *infra*, pp. 35–40.

STATEMENT

A. BACKGROUND

It has long been established that federal income taxes are properly includable as an expense under the cost of service method of ratemaking utilized by the Federal Power Commission in the regulation of rates for sales of natural gas subject to its jurisdiction under the Natural Gas Act, 15 U.S.C. 717 *et seq.* The method of calculating such taxes for ratemaking purposes, however, may not be the same as the method used for calculating the taxes actually paid.

With the adoption of Section 167 of the Internal Revenue Code of 1954, 68A Stat. 51, companies, including regulated utilities, were authorized for the first time to use liberalized or accelerated depreciation in calculating their federal income taxes. Under any of the several methods of liberalized depreciation authorized by Section 167(b), a company may take relatively large depreciation deductions in calculating its federal income taxes during the initial years of an asset's useful life and compensatingly lesser amounts during the later years of the asset's useful life; the aggregate amount of depreciation allowed for tax purposes over the entire life of the asset is the same under the liberalized depreciation method as under the straight-line method where the annual depreciation

deductions are constant throughout an asset's useful life. As the legislative history of Section 167 discloses, Congress anticipated the liberalized depreciation provisions would increase working capital and encourage the "modernization and expansion of industrial capacity, with resulting economic growth, increased production, and a higher standard of living." S. Rep. No. 1622, 83d Cong., 2d Sess., p. 26; H. Rep. No. 1337, 83d Cong, 2d Sess., p. 24.

While Section 167 specified that liberalized depreciation could be used in calculating a company's actual federal income taxes, the question of what depreciation method companies subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, and the Federal Power Act, 16 U.S.C. 791a *et seq.*, should use for the purpose of calculating their federal income tax expense for ratemaking purposes was left within the Commission's discretion.[2] The Commission at first determined that the use of liberalized depreciation for tax purposes merely resulted in a tax deferral and, to avoid benefiting the present customers of a utility at the expense of later customers who would have to pay the deferred taxes, the Commission decided that the income tax expense allowed as a cost of service for ratemaking purposes

[2] The present case is concerned solely with the depreciation methods used by utilities in calculating either their actual federal income taxes or their federal income tax expenses for ratemaking purposes. Not involved is the accounting method prescribed by the Commission for use in calculating depreciation as a separate, non-tax expense to be reflected in establishing rates.

should be "normalized," *i.e.*, computed as if the company were using straight-line depreciation. The difference between the taxes actually paid and the higher taxes reflected as a cost of service for ratemaking purposes was required to be placed in a deferred tax reserve account for the payment of future taxes. See *Amere Gas Utilities Co.*, 15 FPC 760, 781; *Cities of Lexington, etc., Ky.* v. *Federal Power Commission*, 295 F. 2d 109, 114 (C.A. 4).

In *Alabama-Tennessee Natural Gas Co.*, 31 FPC 208, affirmed *sub nom. Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 359 F. 2d 318 (C.A. 5), certiorari denied, 385 U.S. 847, the Commission reconsidered the issue and found that the use of liberalized depreciation by utilities usually resulted in permanent tax savings since most utilities had growing or stable plant investments.[3] Accordingly, the Commission ordered utilities using liberalized depreciation for tax purposes to use the same method for calculating their tax expenses for ratemaking purposes, and thus to "flow-through" to their customers the resultant tax savings.[4] Finally, in *Midwestern Gas Transmission Co.*, 36 FPC 61, affirmed *sub nom. Midwestern Gas Transmission Co.* v. *Federal*

[3] A growing company using liberalized depreciation generally has enough new and replacement property to generate sufficient depreciation allowances to offset the declining depreciation allowances on its existing property.

[4] In the same case, the Commission initiated the policy now in effect that the deferred tax reserve accumulated by a utility that had been using normalization must be deducted from the utility's rate base so that no return on the tax savings would be included in its rates. 31 FPC at 220–221.

Power Commission, 388 F. 2d 444 (C.A. 7), certiorari denied, 392 U.S. 928, the Commission held that for ratemaking purposes it would impute the use of liberalized tax depreciation to any company which shifted from liberalized tax depreciation to straight-line depreciation for calculating its actual taxes and thus would flow through the resulting imputed tax savings to the company's customers. Thus, if the company persisted in using straight-line depreciation for tax purposes, its actual taxes would be higher than the taxes it would be permitted to claim as an expense for ratemaking purposes.

B. SECTION 441(a) OF THE TAX REFORM ACT OF 1969

In considering tax reform legislation in 1969, the House Ways and Means Committee expressed concern about the loss of tax revenues resulting from the shifting by regulated utilities either from straight-line depreciation to liberalized depreciation or from liberalized depreciation with normalization to liberalized depreciation with flow-through;* the committee also cited with disapproval the practice of several regulatory agencies of imputing for ratemaking purposes the use of liberalized depreciation with flow-through to utilities using straight-line depreciation for tax purposes. H. Rep. No. 91-413 (Part 1), 91st Cong.,

* Shifts from straight-line depreciation to liberalized depreciation for tax purposes result in tax revenue losses since depreciation deductions are higher; shifts from liberalized depreciation with normalization to liberalized depreciation with flow-through result in tax revenue losses since the tax benefits are flowed-through to customers by means of lower rates than would otherwise prevail, thus reducing utilities' gross revenues.

1st Sess., pp. 131–132. On the other hand, the House committee rejected suggestions by the Commission and others that all utilities using liberalized depreciation be required to change to straight-line depreciation, since such a rule would place some utilities at a competitive disadvantage and would result in substantial rate increases (*id.* at 132). Accordingly, the committee proposed and the House passed a "freeze" on existing depreciation practices on existing property subject to the following three general rules (*id.* at 133):

> (1) If straight line depreciation is presently being taken, then no faster depreciation is to be permitted as to that property.
>
> (2) If the taxpayer is taking accelerated depreciation and is "normalizing" its deferred taxes, then it must go to the straight line method unless it continues to normalize as to that property.
>
> (3) If the taxpayer is taking accelerated depreciation and flowing through to its customers the benefits of the deferred taxes, then the taxpayer must continue to do so, unless the appropriate regulatory agency permits a change as to that property.

The Senate Committee on Finance, while also expressing concern about the loss of tax revenues from utility depreciation practices, similarly rejected a requirement that all utilities use straight-line depreciation. S. Rep. No. 91–552, 91st Cong., 1st Sess., pp. 172–173. The committee proposed and the Senate passed legislation similar to the House bill, except that utilities on flow-through were given the right to elect within 180 days of the enactment of the bill

> * * * to shift from the flow-through to the straight-line method, with or without the permission of the appropriate regulatory agency, or * * * with the permission of the regulatory agency to shift to the normalization method (that is, to come under general rules of the bill). [*Id.* at 173.]

In conference, the Senate bill was amended to limit a utility's right of election to property acquired by the utility after 1969 to expand its facilities. See H. Conf. Rep. No. 91–782, 91st Cong., 1st Sess., pp. 312–313. As thus amended, the depreciation provisions were enacted as Section 441(a) of the Tax Reform Act of 1969.

Section 441(a) added a new subsection (*l*) to Section 167 of the Internal Revenue Code of 1954, 26 U.S.C. 167(*l*), prescribing what constitutes a "reasonable allowance" for depreciation of public utility property for computing the depreciation deduction under Section 167(a). Section 167(*l*)(3)(B) and (C) distinguishes between pre-1970 property, or property acquired before January 1, 1970, and post-1969 property, or property acquired on or after January 1, 1970. Section 167(*l*)(4)(A) establishes an additional category of post-1969 property which "increases the productive or operational capacity of the taxpayer * * * and does not represent the replacement of existing capacity" (referred to hereafter as "expansion property").

Under Section 167(*l*)(1), a "reasonable allowance" for depreciation for pre-1970 property is an allowance computed under either (1) a "subsection (*l*)" (essen-

tially straight-line, see Section 167(*l*) (3)(F)) method, (2) the method used on tax returns prior to August 1, 1969, on the property or similar property if the company uses normalization, or (3) accelerated depreciation with flow-through if the company used flow-through prior to August 1, 1969. Under Section 167(*l*)(2), a "reasonable allowance" for depreciation for post-1969 property is an allowance computed under either (1) a "subsection (*l*)" method, (2) accelerated depreciation with normalization, or (3) accelerated depreciation with flow-through if the company used flow-through prior to August 1, 1969. Under the election provision, Section 167(*l*)(4)(A), a utility may elect not to have the third option (accelerated depreciation with flow-through) apply to its post-1969 expansion property.

C. PROCEEDINGS BEFORE THE COMMISSION

Following enactment of the Tax Reform Act of 1969, the Texas Gas Transmission Corporation, in the context of pending rate proceedings, advised the Commission of its intent to elect under Section 167(*l*)(4)(A) of the Code to abandon flow-through with respect to its expansion property and, with the Commission's permission, to use liberalized depreciation with normalization with respect to such property in computing its federal income taxes (Pet. App. 59). Before it made the election, however, Texas Gas sought permission to change from flow-through to straight-line depreciation, or, preferably, liberalized depreciation with normalization with respect to its pre–1970 property and

post–1969 replacement property (collectively "existing and replacement property") (*ibid.*).

In Order No. 404, 43 FPC 740, rehearing denied, 44 FPC 16, the Commission announced that as a general policy it would permit utilities making the election under Section 167(*l*)(4)(A) to use liberalized depreciation with normalization with respect to their expansion property.

Subsequently, the Commission issued Opinion No. 578 in Texas Gas' pending rate proceedings permitting Texas Gas to shift to liberalized depreciation with normalization with respect to all its property (Pet. App. 57–66). The Commission found that once Texas Gas had elected to abandon flow-through with respect to its expansion property, the continued use of flow-through with respect to its existing and replacement property would result in a steadily increasing tax expense for ratemaking purposes, since liberalized depreciation on new facilities would no longer be available to offset declining depreciation on existing facilities (Pet. App. 62–63). The Commission concluded that the use of normalization with respect to Texas Gas' existing and replacement property was necessary to promote stable rates (Pet. App. 63).

In accordance with its established practice (see p. 5, *supra*), the Commission required Texas Gas to put the difference between the taxes actually paid and the taxes that would have been paid under straight-line depreciation (and are claimed as a cost of service for ratemaking purposes) into a deferred tax reserve. The

reserve was required to be deducted from the rate base so that the company would not earn any return on the reserve (Pet. App. 65).[6]

D. THE DECISION BELOW

Petitions for review were filed with respect to both Order No. 404 and Opinion No. 578 and were consolidated by the court of appeals. The court upheld the Commission's decision in Order No. 404 to permit utilities electing to abandon flow-through with respect to their expansion property to use liberalized depreciation with normalization on such property (Pet. App. 20–29).[7]

The court below reversed the Commission, however, with respect to Opinion No. 578; it held that Section 441(a) of the Tax Reform Act deprived the Commission of authority to permit utilities to abandon flow-through with respect to their existing and replacement property (Pet. App. 29–39). The court recognized that the original version of the legislation adopted by the House did not limit this authority, but construed the election provision proposed by the

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[6] Texas Gas' customers would thus benefit indirectly from the use of liberalized depreciation with normalization, since the reserve provides the company with capital for the expansion of facilities or the improvement of service at no cost to its customers.

[7] A petition for a writ of certiorari to review this aspect of the decision below was denied by this Court on October 16, 1972. *Memphis Light, Gas and Water Division* v. *Federal Power Commission, et al.*, No. 72–96.

Senate and narrowed in conference as a limitation on the House bill (Pet. App. 31–34). In denying petitions for rehearing, the court reaffirmed its interpretation of Section 441(a) and its legislative history (Pet. App. 41–53).

SUMMARY OF ARGUMENT

1. The Federal Power Commission has traditionally exercised broad authority under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, subject only to limited judicial review, over the rates charged by natural gas companies for the transportation or sale for resale of natural gas in interstate commerce. This authority over rates includes the power to determine the proper allowance to be made for federal income taxes as a cost of service.

Prior to the enactment of the Tax Reform Act of 1969, it was settled that the Commission could, in its discretion, determine the method that companies using liberalized depreciation in calculating their actual federal income taxes should use to compute depreciation in calculating their taxes as a cost of service for ratemaking purposes. With the adoption of Section 441(a) of the Tax Reform Act, Congress restricted the Commission's authority in certain respects—most notably, by giving utilities the unrestricted right to abandon flow-through accounting with respect to their post-1969 expansion property. But in most other respects, the Commission's authority

over tax depreciation practices was left unimpaired. Neither the language nor the legislative history of Section 441(a) supports the holding below that the Commission now lacks the power to permit a utility to change from accelerated depreciation with flow-through to accelerated depreciation with normalization with respect to its existing and replacement property.

Section 441(a) added a new subsection (*l*) to Section 167 of the Internal Revenue Code of 1954. Section 167(*l*)(1) and (2) lists the alternate methods utilities may use in determining depreciation for tax purposes. One of the methods is accelerated depreciation with flow-through if a company used flow-through prior to August 1, 1969. Nothing in the statute, however, implies that a company on flow-through must stay on flow-through and that the Commission or other appropriate regulatory agency lacks the power to permit the company to abandon flow-through.

The legislative history of Section 441(a) confirms the conclusion that Congress did not intend to deprive the Commission of the authority to permit abandonments of flow-through with respect to existing and replacement property. The House report on the initial House version of the legislation expressly referred to such authority. H. Rep. No. 91-413 (Part 1), 91st Cong., 1st Sess., p. 133. The Senate amended the House bill to give utilities the right to elect within 180 days of the enactment of the statute to abandon flow-

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through on all their property. The Senate report makes clear, however, that this right of election merely provided an additional method whereby utilities could get off flow-through; the continued authority of the Commission to permit abandonments of flow-through was expressly acknowledged. S. Rep. No. 91-552, 91st Cong., 1st Sess., pp. 172-173. Accordingly, this authority was not disturbed when the conference amended the bill by limiting the right of election contained in the Senate amendment to post-1969 expansion property.

Finally, the language in the House and Senate reports stating that the legislation was intended to "freeze" existing depreciation practices (H. Rep. No. 91-413, *supra*, pp. 132-133; S. Rep. No. 91-552, *supra*, p. 172) does not support the decision below. The "freeze" was qualified by the general rules embodied in the legislation and summarized in both reports.

2. If the Court agrees with us that the Commission has the authority to permit abandonments of flow-through with respect to existing and replacement property, the Court should affirm the Commission's order permitting Texas Gas to use accelerated depreciation with normalization on its existing and replacement property. Although the court of appeals did not reach the question whether the Commission acted within its discretion in this case, there are no substantial issues requiring further consideration by that court.

ARGUMENT

I

SECTION 167(*l*) OF THE INTERNAL REVENUE CODE DOES NOT DEPRIVE THE FEDERAL POWER COMMISSION OF THE AUTHORITY TO PERMIT UTILITIES SUBJECT TO ITS JURISDICTION TO CHANGE FROM ACCELERATED DEPRECIATION WITH FLOW-THROUGH TO ACCELERATED DEPRECIATION WITH NORMALIZATION WITH RESPECT TO THEIR EXISTING AND REPLACEMENT PROPERTY

A. THE COMMISSION'S BROAD AUTHORITY OVER RATES UNDER THE NATURAL GAS ACT, 15 U.S.C. 717 *ET SEQ.*, INCLUDES AS A GENERAL MATTER THE AUTHORITY TO DETERMINE THE PROPER ALLOWANCE FOR FEDERAL INCOME TAXES AS A COST OF SERVICE

Under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, all rates and charges imposed by natural gas companies[*] for the transportation or sale for resale of natural gas in interstate commerce must be just and reasonable and the Federal Power Commission has the authority to investigate such rates and charges, set aside those which are not just and reasonable and prescribe rates and charges which meet the statutory standard. 15 U.S.C. 717c, 717d. Rates charged by electric utilities subject to the Federal Power Act, 16 U.S.C. 791a *et seq.*, for the transmission or sale for resale of electric energy in interstate commerce must also be just and reasonable and are similarly subject to Commission scrutiny. 16 U.S.C. 824d, 824e.

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[*] A "natural gas company" is a company engaged in the transportation or sale for resale of natural gas in interstate commerce. 15 U.S.C. 717a(6).

In fixing just and reasonable rates under the Natural Gas Act, the Commission is not bound to use "any single formula or combination of formulas," but is "free . . . to make the pragmatic adjustments which may be called for by particular circumstances." *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586. Moreover, rate orders and the underlying methods used by the Commission in promulgating rate orders are subject to only limited judicial review. As this Court noted in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602: "If the total effect of [a] rate order cannot be said to be unjust and unreasonable, judicial inquiry under the [Natural Gas] Act is at an end. . . . [A rate order] is the product of expert judgment which carries a presumption of validity." And in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 767, the Court referred to the "broad responsibilities" given the Commission by Congress and held that the Commission "must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." Finally, the Court has specifically held that the Commission's jurisdiction over rates includes the authority to determine what proper allowance should be made for federal income taxes as a cost of service. *Federal Power Commission* v. *United Gas Pipe Line Co.*, 386 U.S. 237, 243.

Prior to the enactment of the Tax Reform Act of 1969, the Federal Power Commission, in meeting its

ratemaking responsibilities under the Natural Gas Act and the Federal Power Act, exercised broad authority over the methods that electric utilities and natural gas companies subject to its jurisdiction used to compute depreciation in calculating federal income taxes as a cost of service for ratemaking purposes (see pp. 4–6, *supra*) and this broad authority was recognized by the courts. In upholding the Commission's initial decision to require companies using liberalized depreciation for tax purposes to normalize their taxes for ratemaking purposes, the Court of Appeals for the Fourth Circuit stated:

> It is obvious that we are confronted in this case with a problem in a special field which requires the exercise of expert skill that has been generally entrusted by state and Federal legislation to administrative regulatory tribunals whose decisions, in the absence of abuse of discretion, should be followed by the courts. We adopt that course in this case. [*Cities of Lexington, etc., Ky.* v. *Federal Power Commission*, 295 F. 2d 109, 114.]

When the Commission subsequently determined that the tax benefits from liberalized depreciation should be flowed through to consumers, that determination was also found to be a proper exercise of the Commission's broad regulatory powers over rates. *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 359 F. 2d 318, 328–330 (C.A. 5), certiorari denied, 385 U.S. 847. In *Alabama-Tennessee*, the court of appeals carefully reviewed the legislative history of the accelerated depreciation provisions con-

tained in Section 167 of the Internal Revenue Code of 1954, 68A Stat. 51, and concluded (359 F. 2d at 335, footnote omitted):

> * * * It is unlikely to suppose that Congress amended the Natural Gas Act by a reference in the Internal Revenue Code; it is unreasonable to read Section 167 as a mandate reducing the Commission's responsibility to fix fair rates according to its usual ratemaking policies in favor of the consumer. At bottom, the question before us was and is one for Congress to decide. Assuming that Congress considered the effect of Section 167 on ratemaking at the time of enactment or later, we infer that its decision not to disturb, in terms, the status quo of ratemaking indicates a congressional intent that each federal regulatory agency should continue to exercise an informed discretionary authority in accordance with the agency's usual standards in the light of the needs peculiar to the particular industry subject to rate regulation.

See also *City of Chicago* v. *Federal Power Commission*, 385 F. 2d 629 (C.A.D.C.), certiorari denied *sub nom. Public Service Commission of Wisconsin* v. *Federal Power Commission*, 390 U.S. 945; *Midwestern Gas Transmission Co.* v. *Federal Power Commission*, 388 F. 2d 444 (C.A. 7), certiorari denied, 392 U.S. 928.

It is in the light of this background of broad regulatory authority over rates, including the authority to determine how federal income taxes should be reflected for ratemaking purposes, that we turn to Section 441(a) of the Tax Reform Act of 1969.

2. NOTHING IN THE LANGUAGE OF SECTION 167(*l*) RESTRICTS THE AUTHORITY OF THE COMMISSION TO PERMIT CHANGES FROM ACCELERATED DEPRECIATION WITH FLOW-THROUGH TO ACCELERATED DEPRECIATION WITH NORMALIZATION WITH RESPECT TO EXISTING AND REPLACEMENT PROPERTY

There is no doubt that Congress, in enacting Section 441(a) of the Tax Reform Act of 1969, deliberately restricted to some extent the authority of regulatory agencies to prescribe the depreciation methods to be used by utilities in reflecting their federal income taxes on their books of account for ratemaking purposes. For example, a utility which used accelerated depreciation with normalization with respect to its pre–1970 property prior to the enactment of the Tax Reform Act cannot now be required by a regulatory agency to switch to flow-through since under Section 167(*l*)(1) of the Code the use of accelerated depreciation with flow-through by the utility on such property would not result in a "reasonable allowance" for depreciation under Section 167(a). Similarly, the election provision in Section 167(*l*)(4)(A) prohibits the Commission from imputing the use of liberalized depreciation with flow-through for expansion property to utilities electing to abandon flow-through with respect to such property.[9] But the carefully specified,

[9] Section 167 (*l*)(4)(A) provides that if a taxpayer makes an election within 180 days following the enactment of the statute, paragraph (2)(C)—permitting the use of accelerated depreciation with flow-through on post-1969 property if that method was used on similar property prior to August 1, 1969—"shall not apply." The utility's right to make the election within the prescribed period is unqualified and thus not conditioned upon regulatory approval. For a discussion of the legislative history of this provision, see our brief in opposition in No. 72–96 (n. 7, *supra*).

explicit restriction of regulatory discretion in these narrow circumstances by no means implies a wholesale elimination of traditional regulatory authority over depreciation methods used for determining tax expense as a cost of service in ratemaking.

As noted above (pp. 8-9, *supra*), Section 167(*l*)(1) and (2) sets forth the depreciation methods which will result in a "reasonable allowance" for depreciation for federal income tax purposes. One of those methods is accelerated depreciation with flow-through if a company used flow-through prior to August 1, 1969. Section 167(*l*)(1)(B) and (2)(C). Nothing in the statute, however, suggests that a company *must* use that method and that the appropriate regulatory authority may not permit it to use one of the other methods also set forth in the statute—*i.e.*, straight-line depreciation or accelerated depreciation with normalization. Section 167(*l*)(1)(A), (2)(A), and (2)(B). In fact, Section 167(*l*)(1)(B) provides:

> FLOW-THROUGH METHOD OF ACCOUNTING IN CERTAIN CASES.—In the case of any pre-1970 public utility property, the taxpayer *may* [emphasis supplied] use the applicable 1968 method for such property if—
>
> . . .
>
> the taxpayer used flow-through on the property or similar property prior to August 1, 1969.

The use of the word "may" strongly suggests that Congress contemplated that utilities which had been using liberalized depreciation with flow-through might seek per-

mission from the appropriate regulatory authority to abandon flow-through.[19]

In short, the statute merely lists alternate permissible methods of calculating depreciation, but does not specify which alternative a utility must use, if the utility is covered by more than one alternative. Under these circumstances, there is no basis in the language of the statute for concluding that, except where the statute is explicit as in the election provision, Congress intended to deprive the Federal Power Commission and other regulatory agencies of their traditional authority over depreciation methods used to determine federal income taxes as a cost of service for rate-making purposes.

C. THE LEGISLATIVE HISTORY OF SECTION 167(*l*) CONFIRMS THAT CONGRESS DID NOT INTEND TO DEPRIVE THE COMMISSION OF THE AUTHORITY TO PERMIT UTILITIES TO ABANDON FLOW-THROUGH WITH RESPECT TO EXISTING AND REPLACEMENT PROPERTY

Although Section 167(*l*) does not specifically refer to the authority of regulatory agencies over depreciation methods used in calculating income taxes, we have shown that the statute on its face does not restrict

[19] Section 167(*l*)(2)(C)—permitting the use of liberalized depreciation with flow-through on post-1969 property if used on similar property prior to August 1, 1969—does not contain the word "may" since the Section is structured differently from Section 167(*l*)(1)(B). There is no reason to believe, however, that a regulatory agency's authority to permit abandonment of flow-through is any different with respect to post-1969 replacement property (post-1969 expansion property, of course, is subject to the election provision of Section 167(*l*)(4)(A)) than it is with respect to pre-1970 property.

agency authority to permit a utility to change from accelerated depreciation with flow-through to accelerated depreciation with normalization with respect to existing and replacement property. We turn now to the legislative history of Section 167(*l*)—Section 441(a) of the Tax Reform Act of 1969—which discloses that Congress specifically acknowledged and did not disturb the authority of regulatory agencies to permit such a change.

1. As we have noted (see p. 7, *supra*), the initial House version of what became Section 441(a) embodied three general rules with respect to depreciation practices on existing property, the third of which required a utility using liberalized depreciation with flow-through on its existing property to continue using that method of depreciation, "unless the appropriate regulatory agency permits a change as to that property." H. Rep. No. 91-413, *supra*, p. 133. Similarly, if the utility was using liberalized depreciation with flow-through on its existing property, it was required under the House bill to use flow-through on its new property "unless the regulatory agency permits it to change" (*ibid.*). Contrary to the conclusions of the court below (Pet. App. 30-36, 42-45), neither the Senate nor the Conference amendments to the House bill altered the authority of regulatory agencies, expressly acknowledged by the House Ways and Means Committee, to permit the abandonment of flow-through.

The Senate report explains that the Senate amendments follow the general rules of the House bill, ex-

cept that the Senate version of the legislation also gave each utility the right to elect to abandon flow-through and use either straight-line depreciation or, if permitted by the appropriate regulatory agency, accelerated depreciation with normalization. S. Rep. No. 91-552, *supra*, p. 173. With respect to the general rules adopted from the House bill, the Senate report states (*id.* at 172-173):

> Both the House bill and the committee amendments provide that in the case of existing property the following rules are to apply:
>
> * * * * *
>
> (3) If the taxpayer is taking accelerated depreciation and flowing through to its customers the benefits of the deferred taxes, then the taxpayer would continue to do so (except as provided under the committee amendments which are discussed below [*i.e.*, the election provision]), unless the appropriate regulatory agency permits a change as to that property.

The Senate report also notes that with respect to new property, both the House and Senate versions of the bill (*id.* at 173)

> * * * have the effect that if the taxpayer presently flows through to its customers the benefits of deferred taxation, then it would stay on accelerated depreciation and flow through unless the regulatory agency permits it to change (or unless the exception under the committee amendments pointed out below [again, the election provision] applies).

As both the above passages make clear, the Senate bill required utilities to stay on flow-through unless either (1) the appropriate regulatory agency permitted a change under the general rules of the bill, or (2) the utility exercised its right of election. In other words, the right of election adopted by the Senate to be applicable to all utility property simply provided an additional procedure whereby utilities may get off flow-through, but did not restrict the authority of regulatory agencies generally to permit the abandonment of flow-through.

The Conference restricted the right of election added by the Senate to post-1969 expansion property, but otherwise followed the Senate amendments (H. Conf. Rep. No. 91–782, *supra*, pp. 312–313); it thus did not disturb the regulatory authority recognized by the general rules referred to in the House and Senate reports. In reaching the contrary conclusion, the court below (Pet. App. 33–34) placed great emphasis on the Conference report. The report's discussion of the depreciation provisions is contained in four paragraphs, the pertinent provisions of which are as follows (H. Conf. Rep. 91–782, *supra*, pp. 312–313):

> The House bill provides that in the case of certain listed regulated industries * * * a taxpayer is not permitted to use accelerated depreciation unless it "normalizes" * * *.
>
> This rule is not to apply in the case of a taxpayer that is at present flowing through the tax reduction to earnings for purposes of computing its allowable expenses on its regulated books of account. * * *

> The Senate amendment makes the following changes in the House bill: * * * (d) an election is permitted to be made within 180 days after the date of enactment by a company at present on flow-through to come under the rules of the bill; * * *.
>
> The conference substitute (sec. 441 of the substitute and sec. 167(*l*) of the code) follows the Senate amendment except that * * * the 180-day election (item (d), above) is modified to apply to [post-1969 expansion property] * * *.

The court below construed "This rule" in the second paragraph of the report to refer to the final version of the statute as approved by the conference and thus concluded that there was no way a utility could get off flow-through with respect to existing property. A close reading of the report, however, discloses that "This rule" does not refer to the final bill, but refers to the initial House bill summarized in the first two paragraphs of the report's discussion of the depreciation provisions; the third paragraph discusses the Senate amendments and only the fourth paragraph explains the conference modifications of the legislation. When the first two paragraphs are read together, the second paragraph merely states that a company on flow-through *may* remain on flow-through; it does *not* state—what the court below itself conceded the House bill did not provide—that a company on flow-through could not abandon flow-through with respect to its existing property with the permission of the appropriate regulatory agency.

Our interpretation of the legislative history of Section 441(a) is confirmed by the General Explanation of the Tax Reform Act of 1969, H.R. 13270, 91st Congress, Public Law 91-172 (1970), prepared by the Staff of the Joint Committee on Internal Revenue Taxation. Referring to the third rule which applies to existing property under Section 441(a) as finally enacted, the General Explanation states (p. 151):

> If the taxpayer was taking accelerated depreciation and flowing through to its customers the benefits of the deferred taxes as of August 1, 1969, then the taxpayer would continue to do so (except for a special election procedure discussed below), unless the appropriate regulatory agency permits a change as to that property.

And with respect to new property, the explanation states that a utility on flow-through must remain on flow-through "unless the regulatory agency permits it to change (or unless the election below applies)" (*ibid.*).

The court of appeals refused to accept these summaries as accurate reflections of the legislative intent in enacting Section 441(a) on the ground that the language was lifted largely from the House and Senate reports (Pet. App. 47-49). The specific references in the General Explanation to the right of election and the subsequent discussion of the right of election, including the observation that it applies only to expansion property (General Explanation, p. 152), however, show that the Staff fully considered the impact of the Conference amendment and correctly concluded

that the Conference did not depart from this area of agreement in the House and Senate bills. The General Explanation thus provides further contemporary and solid evidence that regulatory agency authority to permit abandonments of flow-through was not impaired by the addition of a provision giving utilities the absolute right not to have flow-through apply to their expansion property.

2. The court below also emphasized the statements in the House and Senate reports that the proposed legislation was intended to "freeze" the current situation regarding methods of depreciation (Pet. App. 34–36). This emphasis is misplaced and does not support the decision below. The House report, after discussing the loss of tax revenues occasioned by shifts by utilities from straight-line to accelerated depreciation and shifts from normalization to flow-through, states (H. Rep. No. 91–413, *supra*, pp. 132–133):

> Consideration has been given to suggestions by the Federal Power Commission and others that regulated utilities no longer be permitted to use a method of depreciation other than straight line. However, your committee concluded that, in too many cases, this would place regulated utilities at an unfair competitive disadvantage, both in terms of the sale of their products or services and their attractiveness to equity investors. Also, this would result in prompt, substantial, and widespread utility rate increases.
>
> Accordingly, your committee has determined in general to "freeze" the current situation regarding methods of depreciation in the case

> of those companies in what are, by and large, the more healthy utility industries. * * *

Similarly, the Senate report discusses the loss of tax revenues from shifts in depreciation methods and then states (S. Rep. No. 91–552, *supra*, p. 172):

> * * * [A] rule requiring all * * * utilities to shift to straight line depreciation would place regulated utilities at an unfair competitive disadvantage, both in terms of the sale of their products or services and their attractiveness to equity investors. Consideration of legislative action in this area is complicated by the fact that many utilities do not have effective monopolies while others do; many utilities are in growing industries while others are losing ground; many utilities compete (to the extent they face any competition) only with other regulated utilities while others compete with businesses not subject to governmental rate regulation.
>
> Accordingly, the committee agrees with the House that it is appropriate to in general "freeze" the current situation regarding methods of depreciation in the case of those companies in what are, by and large, the more flourishing utility industries.

The "freeze" envisioned by Congress, then, was intended (1) to forestall switches to faster methods of depreciation or from normalization to flow-through, (2) to guard against "prompt, substantial and widespread" rate increases and (3) to avoid putting some utilities at a competitive disadvantage. But, as is clear from both the House and Senate versions of the legislation and from both the House and Senate reports,

the "freeze" was not intended to be absolute. Only shifts from straight-line to accelerated depreciation or from normalization to flow-through on existing property were prohibited. Otherwise, the elimination of the threat of immediate and widespread rate increases and the desire not to force some utilities into a competitively disadvantageous posture were accomplished, not by an absolute freeze on existing practices, but by not forcing the abandonment of flow-through or changes to straight-line depreciation and leaving such matters to the discretion of the regulatory agencies. In other words, while Congress imposed a "freeze" so that utilities would not be required to abandon flow-through, it did not deny regulatory agencies the authority to determine whether in particular instances the abandonment of flow-through by a utility would be in the public interest.[11]

II

THE COMMISSION'S ACTION IN PERMITTING TEXAS GAS TO CHANGE FROM FLOW-THROUGH TO NORMALIZATION WITH RESPECT TO ITS EXISTING AND REPLACEMENT PROPERTY WAS PROPER AND SHOULD BE AFFIRMED WITHOUT FURTHER PROCEEDINGS IN THE COURT OF APPEALS

In holding that the Commission lacked the power to permit Texas Gas to abandon flow-through with respect to existing and replacement property, the court of appeals did not reach the question whether,

[11] For a thorough analysis of the derivation of the qualified "freeze" concept explained in the House and Senate reports, see the brief on the merits of Texas Gas in these cases at pp. 47-53.

assuming the Commission did have the power, its action in this case was proper. If the Court agrees with us that Section 441(a) of the Tax Reform Act of 1969 did not deprive the Commission of authority to permit abandonments of flow-through, the scope of judicial review of the Commission's exercise of that authority is very limited (see pp. 15–18, *supra*). The Commission's opinions in Nos. 578 and 578–A (Pet. App. 57–71) show that it acted well within its discretion in authorizing the change in Texas Gas' depreciation practices. Since there are no substantial issues requiring further consideration by the court of appeals, this Court should affirm the Commission's order on the merits.

When the Commission determined in 1964 in *Alabama-Tennessee Natural Gas Co.*, 31 FPC 208, affirmed *sub nom. Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 359 F. 2d 318 (CA. 5), certiorari denied, 385 U.S. 847, that utilities using accelerated depreciation in calculating their federal income taxes should flow-through the resulting tax benefits to their customers, it based its decision on two important assumptions: (1) that the supply of natural gas would continue to expand rapidly at least until the end of this century and would generate proportional increases in plant investment (31 FPC at 217–218), and (2) that as a result of the continued expansion of the natural gas industry, liberalized depreciation on new assets would more than counterbalance declining depreciation on older assets (*id.* at 215–216). Neither assumption is valid today.

With respect to the supply of natural gas, this Court just last Term referred to "a pattern of temporary and chronic natural gas shortages throughout the Nation." *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 626. See also *Texaco, Inc.* v. *Federal Power Commission*, C.A.D.C., No. 71-1560, slip op. at 6 (decided December 12, 1972); Federal Power Commission Staff Report No. 2, *National Gas Supply and Demand, 1971–1990*, pp. xi–xii, 1–38 (1972). Thus, the continued rapid expansion of the natural gas industry can no longer be taken for granted.

Even if the natural gas industry should continue to expand, however, the second *Alabama-Tennessee* assumption falls with respect to companies like Texas Gas which have elected to abandon flow-through with respect to their post-1969 expansion property. As we have noted (p. 10, *supra*), the Commission in Order No. 404 announced as a general policy that utilities making the election under Section 167(*l*)(4)(A) to abandon flow-through on their expansion property would be permitted to use normalization with respect to such property. In other words, Texas Gas, having made the election, now uses liberalized depreciation on its expansion property for federal income tax purposes, but uses straight-line depreciation on such property in determining its income tax expense on its books of account for ratemaking purposes.[11] Thus, for ratemaking purposes, the benefits of liberalized depre-

[11] The difference between what the company reflects on its books of account as its tax expense and the taxes the company actually pays is placed in a special, restricted reserve for the payment of future taxes.

ciation on the company's expansion property are no longer available in calculating the company's tax expense on its books of account to offset the effects of declining tax depreciation on the company's books of acount arising from the continued use of flow-through on existing property.

Nor would the continued use of flow-through on replacement property produce sufficient tax depreciation allowances to offset declining tax depreciation allowances on existing property. As the Commission noted in this case, the permissible tax depreciation life of natural gas properties in general is far shorter than the physical life of such properties (Pet. App. 63). Thus, replacements are relatively infrequent and may not be necessary until well after an asset is fully depreciated. As the result of the use of flow-through, the total depreciation on existing and replacement property as reflected in the tax expense item in a company's books of account (as distinguished from what would be reflected on the company's actual tax return) would steadily decrease relative to what the depreciation would have been under normalization and there would be no permanent deferral of taxes. Present consumers would thus be benefited at the unwarranted expense of future consumers (Pet. App. 65).

While the above observations apply to the natural gas industry in general, they also apply to Texas Gas in particular. A company executive testified at the hearing in this case that from 1970 to 1971 the tax depreciation on its existing property would decline by more than $1,100,000 (App. 17). He stated that, in

order to generate sufficient additional depreciation so that the dollar differential between tax depreciation and straight-line depreciation for 1970 would remain the same for 1971, the company would have had to invest $33,000,000 in new plant equipment (*ibid.*). And if the company were normalizing its tax depreciation for expansion property—as permitted by Commission Order No. 404—a $33,000,000 investment in replacement property would be required. While the record does not disclose what Texas Gas' actual investment in replacement equipment was in 1972, the annual reports of the company filed with the Commission (FPC Form 2) show that the company's average plant retirements from 1965 through 1969, valued at original cost, were $2.7 million per year. Even if all the retired equipment were replaced,[13] the value of the replacements would be but a fraction of the $33,000,000 needed to maintain the differential between tax depreciation under flow-through and straight-line depreciation. Since Texas Gas' tax de-

[13] The regulations under Section 167(*l*) specify alternate formulae for determining what portion of a company's new investments in any given year qualifies as post-1969 expansion property covered by the election under Section 167(*l*)(4)(A) and what portion constitutes replacement property subject to the general provisions of the statute. Under the formula used by Texas Gas (see Treas. Reg. 1.167(*l*)–4(c)), the maximum amount of its new investments in any one year which would not qualify as expansion property (*i.e.*, which would be considered replacement property) would be an amount equal to its plant retirements in that year. In 1969, for example, Texas Gas had retirements of $1.9 million (FPC Form 2) and net plant additions of $59.7 million (App. 41). Of the plant additions, only $1.9 million, at most, would be considered replacement property.

preciation on existing and replacement property as reflected in its books of account for ratemaking purposes would decline under flow-through relative to what it would be under normalization, the company's future customers would bear the burden of the present taxes temporarily deferred through the use of liberalized depreciation for tax purposes. This would not occur under normalization.

Under all the circumstances, the Commission acted well within its competence and authority in concluding that stable rates and the public interest would be promoted by permitting Texas Gas to use the same method of depreciation on all its property in calculating its federal income tax expense for ratemaking purposes.

CONCLUSION

Insofar as it set aside Opinions Nos. 578 and 578-A of the Federal Power Commission, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1973.

APPENDIX

STATUTE INVOLVED

Section 441 of the Tax Reform Act of 1969, 83 Stat. 625, 26 U.S.C. 167 (*l*), provides:

(a) IN GENERAL. Section 167 (relating to depreciation) is amended by inserting after subsection (k) (added by section 521) the following new subsection:

"(*l*) REASONABLE ALLOWANCE IN CASE OF PROPERTY OF CERTAIN UTILITIES.—

"(1) PRE-1970 PUBLIC UTILITY PROPERTY.—

"(A) IN GENERAL.—In the case of any pre-1970 public utility property, the term 'reasonable allowance' as used in subsection (a) means an allowance computed under—

"(i) a subsection (*l*) method, or

"(ii) the applicable 1968 method for such property. Except as provided in subparagraph (B), clause (ii) shall apply only if the taxpayer uses a normalization method of accounting.

"(B) FLOW-THROUGH METHOD OF ACCOUNTING IN CERTAIN CASES.—In the case of any pre-1970 public utility property, the taxpayer may use the applicable 1968 method for such property if—

"(i) the taxpayer used a flow-through method of accounting for such property for its July 1969 accounting period, or

"(ii) the first accounting period with respect to such property is after the July 1969 accounting period, and the taxpayer used a flow-through method of accounting for its July 1969 accounting period for the property on the basis of which the applicable 1968 method for the property in question is established.

"(2) POST-1969 PUBLIC UTILITY PROPERTY.—In the case of any post-1969 public utility property, the term 'reasonable allowance' as used in subsection (a) means an allowance computed under—

"(A) a subsection (*l*) method,

"(B) a method otherwise allowable under this section if the taxpayer uses a normalization method of accounting, or

"(C) the applicable 1968 method, if, with respect to its pre-1970 public utility property of the same (or similar) kind most recently placed in service, the taxpayer used a flow-through method of accounting for its July 1969 accounting period.

"(3) DEFINITIONS.—For purposes of this subsection—

"(A) PUBLIC UTILITY PROPERTY.—The term 'public utility property' means property used predominantly in the trade or business of the furnishing or sale of—

"(i) electrical energy, water, or sewage disposal services,

"(ii) gas or steam through a local distribution system,

"(iii) telephone services, or other communication services if furnished or sold by the Communications Satellite Corporation for purposes authorized by the Communications Satellite Act of 1962 (47 U.S.C. 701), or

"(iv) transportation of gas or steam by pipeline, if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision

thereof, by any agency or instrumentality of the United States, or by a public service or public utility commission or other similar body of any State or political subdivision thereof.

"(B) PRE-1970 PUBLIC UTILITY PROPERTY.—The term 'pre-1970 public utility property' means property which was public utility property in the hands of any person at any time before January 1, 1970.

"(C) POST-1969 PUBLIC UTILITY PROPERTY.—The term 'post-1969 public utility property' means any public utility property which is not pre-1970 public utility property.

"(D) APPLICABLE 1968 METHOD.—The term 'applicable 1968 method' means, with respect to any public utility property—

"(i) the method of depreciation used on a return with respect to such property for the latest taxable year for which a return was filed before August 1, 1969,

"(ii) if clause (i) does not apply, the method used by the taxpayer on a return for the latest taxable year for which a return was filed before August 1, 1969, with respect to its public utility property of the same kind (or if there is no property of the same kind, property of the most similar kind) most recently placed in service, or

"(iii) if neither clause (i) nor (ii) applies, a subsection (*l*) method.

In the case of any section 1250 property to which subsection (j) applies, the term 'applicable 1968 method' means the method permitted under subsection (j) which is most nearly comparable to the applicable 1968 method determined under the preceding sentence.

"(E) APPLICABLE 1968 METHOD IN CERTAIN CASES.—If the taxpayer evidenced the intent to use a method of depreciation (other than its applicable 1968 method or a subsection (*l*) method) with respect to any public utility property in a timely application for change of

"(5) REORGANIZATIONS, ASSETS ACQUISITI
ETC.—If by reason of a corporate reorgani
tion, by reason of any other acquisition of
assets of one taxpayer by another taxpayer
reason of the fact that any trade or busi
of the taxpayer is subject to ratemaking
more than one body, or by reason of other
cumstances, the application of any provis
of this subsection to any public utility prope
does not carry out the purposes of this
section, the Secretary or his delegate shall
vide by regulations for the application of
provisions in a manner consistent with the
poses of this subsection."

(b) EFFECTIVE DATE.—The amendment m
by subsection (a) shall apply with respect
all taxable years for which a return has
been filed before August 1, 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-486 and 72-488

FEDERAL POWER COMMISSION, *Petitioner*

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

TEXAS GAS TRANSMISSION CORPORATION, *Petitioner*

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

RESPONSE OF MEMPHIS LIGHT, GAS AND WATER DIVISION AND THE PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK IN OPPOSITION TO MOTIONS OF INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA AND FOUR ELECTRIC UTILITIES FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE

To the Honorable, The Chief Justice of the United States and Associate Justices:

Memphis Light, Gas and Water Division (Memphis) and The Public Service Commission for the State of New York (New York), hereinafter collectively "Respondents", file this response in opposition to the sep-

arate motions of Independent Natural Gas Association of America (INGAA) and of four electric utilities[1] to file briefs as amici curiae in support of the Petitioners in Nos. 72-486 and 72-488.

Respondents declined to consent to the filing of a brief as amici curiae by the four electric utilities. Memphis also declined to consent to the filing of a brief as amicus curiae by INGAA. New York consented to the filing of a brief as amicus curiae by INGAA, but on review of INGAA's motion and brief believes the motion should be denied for the reasons hereinafter stated.

Rule 42(3) of the Rules of this Court requires that the motion for leave to file a brief as an amicus curiae shall, among other things, "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case . . . ."

Neither INGAA nor the four electric utilities come close to meeting the requirements of Rule 42(3). INGAA simply makes the bald, unsupported assertion (Motion, p. 3) that the interests of other INGAA members are not represented by Texas Gas Transmission Corporation, one of the Petitioners and an INGAA member, and by the other Petitioner, the Federal Power Commission. The four electric utilities assert (Motion, p. 2) that no electric utility is a party to the proceeding and, therefore, they "do not believe that any of the parties to these proceedings can properly be expected to demonstrate to this Court the effect the

[1] Jersey Central Power & Light Company, Metropolitan Edison Company, New Jersey Power & Light Company, Pennsylvania Electric Company.

decision of the Court below, if not reversed, will have upon electric utilities."

Examination of the briefs attached to the motions discloses only repetition of the arguments presented by Petitioners in 120 pages of briefs. In fact, the brief of the four electric utilities, despite the allegation in the motion quoted above, contains nothing specific concerning the alleged impact upon electric utilities, including the four electric utilities.

WHEREFORE, the motions for leave to file briefs as amici curiae should be denied.

Respectfully submitted,

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February 9, 1973.